STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	
	)	ICC Docket No. 11-0083
	)	
Petition for Arbitration of	)	
Interconnection Agreement with	)	
Big River Telephone Company, LLC.	)	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

PUBLIC VERSION

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The Staff of the Illinois Commerce Commission (the “Staff"), by and through its counsel, and pursuant to Section 761.400 of the Commission's Rules of Practice (83 Ill. Adm. Code 761.400), respectfully submits its Reply Brief in the above-captioned matter.

I. Reply to Big River

A. Big River’s Bill and Keep Proposal is Contrary to the FCC’s Rules, Unsupported by Evidence, and Should be Rejected

Big River advances four arguments in support of its bill and keep proposal. First, it makes an extended argument that a parent or affiliate of the Illinois Bell Telephone Company (AT&T Illinois) has, through the agency of a group called the Intercarrier Compensation Forum, argued for a general adoption of bill and keep throughout the country. *See, generally*, Big River Initial Brief at 5-8. Second, it contends that AT&T Illinois cannot be genuinely concerned about intercarrier compensation arbitrage, in light of its apparent willingness not to bill Big River for reciprocal compensation until several months prior to this arbitration. Id. at 8-9. Third, Big River argues that imposing a billed compensation scheme would require it to incur substantial costs. Id. at 9. Fourth, it argues that the traffic data produced by AT&T Illinois, and relied upon by Staff, is unreliable, based upon a so called “reasonableness test” devised by Big River’s president. Id. at 9-10. Each of these arguments is defective, and all should be rejected.

Staff has no interest in what AT&T Illinois’ parent company may or may not argue at the FCC regarding intercarrier compensation reform. Indeed, it is not apparent to the Staff what Big River intends to show through this – Big River

does not appear to claim that AT&T Illinois is thereby estopped from seeking a billed compensation scheme. The fact remains, however, that the Commission is confronted with resolving a bill and keep dispute under the rules as they currently exist. The FCC rules are, moreover, admirably clear, providing that:

> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to Sec. 51.711(b).
>
> (c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.
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> 47 C.F.R. §51.713(b-c)

The record evidence in this proceeding, however, overwhelmingly supports the proposition that traffic is currently *far out of balance,* being ***BEGIN CONFIDENTIAL XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXX. END CONFIDENTIAL*** Staff Ex. 1.0 at 9-10, *citing* AT&T Illinois Responses and Supplemental Responses to Staff Data Requests JZ 1.02 and 1.15. The existing record does not, by any stretch of the imagination, support a finding of "rough balance". Id. Moreover, the imbalance shown by AT&T Illinois data markedly exceeds the +/- 5% benchmark for imbalance that both parties apparently accept. Staff Ex. 1.0 at 10, *citing* Petition, Ex. B at 2 (AT&T Illinois Contract Provision, Issue 2; Big River Contract Provision, Issue 1).

Big River attempts to argue that the data provided by AT&T Illinois is: "on its face, unreasonable." Big River Initial Brief at 10. It purports to show this through a so-called "high level reasonableness check." Tr. at 68. For reasons already discussed, Staff Initial Brief at 10-11, and dwelt on in more detail below, this so-called "reasonableness test" is fraught with error and should be disregarded.

Staff offers no opinion regarding the likelihood of intercarrier compensation arbitrage between these parties. It notes, however, that the FCC has expressed concern regarding such arbitrage. *See Order on Remand and Report and Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131. CC Docket No. 96-98; CC Docket No. 99-68, 16 FCC Rcd 9151; 2001 FCC Lexis 2340; 23 Comm. Reg. (P & F) 678 (Rel. April 27, 2001) (ISP-Bound Traffic Order on Remand). At issue in the *ISP-Bound Traffic Order on Remand* was proper jurisdictional and rate treatment of telecommunications traffic sent to information service providers (ISPs) by LEC customers seeking dial-up access to the Internet. *See* ISP-Bound Traffic Order on Remand, *generally*. There, the FCC recognized that such traffic, which inherently flows one way (since no calls are originated by ISPs): "create[s] opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets[,]" inasmuch as: "such market distortions … allow[] a service provider to recover some of its costs from other carriers rather than from its end-users." Id.,

¶2. Throughout the *ISP-Bound Traffic Order on Remand*, the FCC expressed as its goal the elimination of regulatory arbitrage opportunities associated with reciprocal compensation in this context. Id., ¶¶69, 74, 77, 81, 83, n.154. This Commission likewise has declined to countenance regulatory arbitrage in reciprocal compensation. *See, e.g.,* Arbitration Decision at 39, AT&T Communications of Illinois, Inc., TCG Illinois and TCG Chicago Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996, ICC Docket No. 03-0239, 2003 Ill. PUC Lexis 715 (August 26, 2003). Accordingly, whether or not AT&T Illinois' motives regarding the prevention of arbitrage are pure, public policy abhors intercarrier compensation arbitrage.

The issue of whether Big River will incur costs associated with traffic capture and billing if the parties move to a billed compensation regime is, under the circumstances, not relevant. As noted above, the Commission may impose a bill and keep arrangement – in its discretion – if traffic is roughly balanced, and expected to remain so. 47 C.F.R. §51.713(b); *First Report And Order*, ¶1111, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, FCC No. 96-325, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499; 1996 FCC Lexis 4312; 4 Comm. Reg. (P & F) 1 (August 8, 1996) (Local Competition Order). If traffic is not roughly balanced, a bill and keep arrangement is out of the question,

since the arrangement will not: "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination[,]" as is required by statute. 47 U.S.C. §252(d)(2)(A)(1); *see also* Local Competition Order, ¶1111 (arrangements that do not provide for mutual and reciprocal cost recovery are not just and reasonable). The costs that Big River might incur in moving to a billed compensation arrangement are therefore a cost of doing business. Further, since the ICA language proposed by each party has the same definition of balance, and the traffic volume determining balance under each proposal does not vary with costs, costs are effectively irrelevant to the dispute, and not something the Commission should consider in this proceeding.

Finally, Big River, as noted above, attempts to discredit the traffic data provided by Staff to AT&T. Big River initial Brief at 10-11. Big River is, however, unable to do so through the use of its own traffic data, since it maintains none. Staff Ex. 1.0 at 9, *citing* Big River Responses to Staff Data Requests JZ 1.02, 1.05 and 1.06; Tr. at 60-61. Accordingly, Big River performed a so-called "reasonableness check" upon AT&T Illinois' data and, inevitably, determined that the data was unreasonable. Big River 2 at 5, *et seq*.; Big River Initial Brief at 10. Big River argues that: "[b]ased on his experience in the industry, [Big River] Witness Howe testified that he would expect that the minutes of outbound traffic would fall within a range of 10 to 20 minutes of use per line per day[,]" and that the: "data indicated that Big River customers essentially made no calls which terminated on AT&T Illinois' network." Big River Initial Brief at 10. There is no

sound basis for Mr. Howe's assumption and certainly no support for it in the evidence provided by Big River.

If all customers call patterns were uniform, then traffic flows would, as a matter of logic and common sense, generally be balanced. However, customer calling patterns vary widely -- as do traffic balances. In his Direct Testimony, Mr. Howe refers to carriers targeting of ISPs. Big River Ex. 1 at 4. ISPs are a class of customers that terminate a great deal of traffic and originate almost none. *See* ISP-Bound Traffic Order on Remand, ¶21 ("[T]raffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results"). Accordingly, traffic flows between LECs that serve ISP providers and other LECs simply do not correspond to Mr. Howe's assumptions regarding outbound traffic volumes. The same is true of call centers. Tr. at 172.

Mr. Howe appears to concede this; he refers to that fact that carriers serving ISPs were able to generate net reciprocal compensation revenue under a reciprocal compensation system. Big River Ex. 1 at 5. However, his "reasonableness check" makes no allowance for this possibility, and indeed the record is lacking in specific information regarding what types of customers Big River serves. Tr. at 172 (Dr. Zolnierek observes the dearth of evidence on this point); Big River Ex. 1 at 2 (Mr. Howe states, without further elaboration, that: "Big River provides basic voice telecommunications services to residential [sic] and commercial businesses").

Moreover, when queried by Big River as to whether the traffic numbers presented by AT&T Illinois "in and of themselves" appeared reasonable, Dr.

Zolnierek responded that traffic balances are dependent on customer types, that imbalances and unidirectional traffic volumes do occur for certain classes of customers (e.g., business customers that run call centers) and, therefore, low outgoing traffic volumes or traffic imbalances are no reason, standing alone, to find traffic information unreasonable. Tr. at 172.

Finally, Mr. Howe's "reasonableness check" has been effectively and utterly discredited. He concedes that his data included traffic originated by carriers other than Big River and terminated to carriers other than AT&T Illinois. Tr. at 66-67, 144-145. Such traffic is not subject to reciprocal compensation as between Big River and AT&T Illinois, since the carrier originating traffic is the one obliged to pay reciprocal compensation, 47 C.F.R. §51.703(b), and the carrier terminating the traffic is the one entitled to receive reciprocal compensation. 47 C.F.R. §51.701(e). Thus, Big River's "reasonableness test" includes traffic that should not be included in determining whether traffic eligible for reciprocal compensation is balanced. Further, Mr. Howe is unable to state how much such traffic might be included, except to state that "a preponderance" of such traffic is AT&T Illinois to Big River, or the reverse. Tr. at 149, 151. Such an "analysis" is, of course, absolutely no use to the ALJ and Commission in resolving this matter.

In summary, the overwhelming weight of evidence supports the proposition that traffic is significantly out of balance and that, as such, the Commission should not impose a bill and keep arrangement.

B. Big River's Proposed Transport Rates are Unsupported by Evidence and Should be Rejected

Big River criticizes AT&T Illinois' tariffed transit rates because they are ostensibly "derived from a cost study based on data from Ohio." Big River Reply Brief at 13. This is, to put it as charitably as possible, a disingenuous assertion. Big River apparently refers to two pages in an AT&T Illinois cost study. See Big River Ex. 2, Schedule 2 at pages marked 385-86. The AT&T Illinois cost study was used, after undergoing a significant number of Commission-ordered changes in no fewer that three Orders, *see Second Interim Order*, Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic, ICC Docket Nos. 96-0486 / 96-0569 (consol.) (February 17, 1998)(hereafter "TELRIC Order"); *Order*, Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues, ICC Docket No. 98-0396 (October 16, 2001) (hereafter "TELRIC II Order"); *Order on Rehearing*, Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues, ICC Docket No. 98-0396 (April 30,

2002), to establish TELRIC and shared and common costs – and thus UNE rates – in Illinois.

Mr. Howe concedes that: "the costs on [page] 386 [of schedule 2] … support the customer billing, just the accounting, added labor and costs" that were allocated, on a state-by-state basis, to transit service TELRICs. Tr. at 135. Thus, the costs in question were properly included in the study.

In ant case, Big River fails to explain how any "data from Ohio" was relied upon in determining the Illinois rates or why such reliance in developing Illinois specific rates was improper. For these reasons alone, Big River's assertions should be given no weight.

Moreover, the Ohio reference in the cost study is ***BEGIN CONFIDENTIAL XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXX. END CONFIDENTIAL*** See Big River Ex. 2, Schedule 2 at page marked 385. Thus, this cost is ostensibly for work performed in Ohio, but performed in order to provide transit billing service in Illinois (and the entire region served by then Ameritech). Thus, what evidence is directly included within the cost study suggests that the inclusion of data from Ohio in an Illinois cost study is for Illinois- specific work performed in Ohio and, thus, entirely appropriate to include in an study designed to measure the costs of providing service in Illinois. In any case, Big River does not make clear why a Missouri rate, supported by no cost data or cost study whatever, AT&T Ex. 1.1 at 3,

should be preferred to a rate developed under careful Commission oversight, using Illinois TELRICs that include – quite properly – a modicum of Ohio data.

Big River argues that the network functionality involved in completing a transit call is identical to that required to complete local tandem calls. Big River Reply Brief at 15-16. Big River fails to explain what is included in such network functionality within its definition of "the network functionality involved", but certainly excludes items such as ***BEGIN CONFIDENTIAL XXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. END CONFIDENTIAL*** *See* Big River Ex. 2, Schedule 2 at page marked 385. Without accounting for such differences and their impact on costs, Big River's observation regarding the comparability of network functionality involved in completing a transit call versus local tandem calls provides no support for Big River's assertion that AT&T Illinois' tariffed transit rates are unreasonable.

Big River's criticisms of AT&T Illinois' tariffed transit rate amount to nothing more than a collateral attack upon those rates which, it scarcely need be reiterated at this point, were developed under the oversight of the Commission. In making its recommendation regarding the appropriate transit rate in this proceeding, Staff relied upon the fact that AT&T Illinois' transit rates are those developed for Illinois under the direction and review of the Commission and its Staff, Staff Ex. 1.0 at 22, while the transit rate proposed by Big River is imported from another state and entirely unsupported. AT&T Ex. 1.1 at 3. Nothing in Big River's repeated attempts to collaterally attach the tariffed transit rates alters

these facts or changes Staff's recommendations. The Commission should adopt the transit rates currently included in AT&T Illinois' tariffs.

II. Reply to AT&T Illinois

The Staff concurs generally in AT&T Illinois' position insofar as it relates to the imposition of a bill and keep regime, and transit rates, terms and conditions. However, the Staff believes that AT&T Illinois makes a misstatement that might, if left unchallenged, affect the decision-making process in this proceeding.

AT&T Illinois asserts that:

> This Commission has made it clear that in a dispute as to whether a bill-and-keep arrangement should be adopted in lieu of the payment of reciprocal compensation, it is the proponent of bill-and-keep (here, Big River), that has the burden of proving by a preponderance of the evidence that the traffic is in balance. *Sprint Communications L.P., et al. v. Illinois Bell Telephone Company*, Docket 07-0629, *Order*, p. 23 (July 30, 2008) (rejecting Sprint's bill-and-keep proposal where "Sprint has not demonstrated by a preponderance of the evidence that" that "traffic is sufficiently in balance to warrant imposition of a bill-and-keep arrangement in this case").
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> AT&T Initial Brief at 9

With respect to apportioning the burden of proof, the Sprint case is not apposite here. In that proceeding, the various Sprint entities filed a complaint against AT&T Illinois under the authority of Sections 10-108 and 13-515 of the Public Utilities Act, which authorize the filing of complaints before the Commission. Sprint Order at 1; *see also* 220 ILCS 5/10-108, 13-515. In that Order, the question of which party bore the burden of proof was squarely before the Commission, as Sprint argued that, notwithstanding its status as

complainant, it did not have the burden with respect to most issues. Sprint Order at 29. The Commission rejected this position, stating as follows:

> Sprint contends that it should be permitted to import the Kentucky ICA substantially without revision into Illinois, and that, to the extent that AT&T proposes any state-specific revisions to the Kentucky ICA, it bears the burden of proving that such revisions do in fact constitute required revisions under Merger Commitment 7.1. AT&T and Staff separately argue that Sprint, as the complainant here, bears the burden of proving the allegations necessary to entitle it to the relief sought in its complaint.
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> **With respect to this question, the following is clear: Sprint has elected to bring this matter before the Commission as a complaint under the authority of Section 13-515, rather than as an arbitration proceeding under Section 252 of the federal Act**. We assume this to be a conscious election on the part of Sprint, and the election to bring a complaint under Section 13-515 affords Sprint certain advantages that it would not enjoy were it to have sought relief by seeking arbitration under the federal Act.
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> …
>
> **However, by seeking relief through the Section 13-515 complaint process, Sprint has, as AT&T and the Staff both argue, accepted the burden of pleading and proving each and every allegation necessary to entitle it to the relief it seeks.** The proposition that a complainant has the burden of proof is a long-standing tenet of law, and one which, as the Staff notes, applies fully to administrative proceedings in Illinois.
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> Sprint Order at 31 (emphasis added)

It is clear from the *Sprint Order* that Sprint bore the burden of proof associated with imposing a bill and keep arrangement in that proceeding because it was the complainant, not because the Commission believes that the proponent of a bill and keep arrangement has the burden of proving the propriety of such an arrangement in all proceedings, including mandatory arbitrations under Section 252 of the federal Act. Section 252(b)(4) of the federal Act does

not assign the burden of proof to either party to a Section 252 arbitration; *see, generally*, 47 U.S.C. §252(b); and Section 51.713(c) of the FCC's Rules states that a state Commission may presume that traffic is roughly balanced for purposes of imposing a bill and keep arrangement: "unless a party rebuts such a presumption." 47 C.F.R. §51.713(c).

Obviously, in this case, any presumption that traffic is roughly balanced has been fully and unequivocally rebutted. As noted above, the overwhelming weight of evidence shows that traffic is not remotely in balance. Accordingly, this issue should be decided in AT&T Illinois' favor. It should not, however, be decided based upon the notion that the Commission has enunciated an evidentiary presumption against bill and keep; as seen above, it has done no such thing.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

April 25, 2011

Respectfully submitted,

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